

fundamental part of any effort to ensure the existence of a healthy video marketplace, repeal of the compulsory license would be inconsistent with the Commission's policy objectives.

NAB urges the Commission, therefore, to endorse legislation incorporating retransmission consent and must carry rules to end the ongoing subsidy of cable operators by broadcasters. NAB believes these measures, above all others, are the most significant steps that can be taken to ensure the central position of over-the-air broadcasting in the Nation's communications mix.

III. ELIMINATION OF THE NATIONAL OWNERSHIP RULES IS WARRANTED BY THE DRAMATIC CHANGES IN THE VIDEO MARKETPLACE AND THE NEED TO PROVIDE BROADCASTERS WITH THE FLEXIBILITY NECESSARY TO STIMULATE PROGRAM DIVERSITY

The stated purpose of the Commission's rules limiting the number and coverage of television broadcast stations that can be under common ownership and control are: "(1) to encourage diversity of ownership in order to foster the expression of varied viewpoints and programming, and (2) to safeguard against undue concentration of economic power."^{27/} While these rules once may have served an important role in promoting industry competition and program and ownership diversity, the dramatic changes in the video marketplace in the seven years since the rules were last revisited have made them an unnecessary and counterproductive anachronism.

^{27/} Report and Order in Dkt. No. 83-1009, 56 R.R.2d 859, 863 (1984) ("Multiple Ownership R & O").

First, a serious question exists as to whether, in seeking to maintain or stimulate viewpoint diversity and limiting economic concentration of power, rules that impose national limitations on broadcast station ownership are even relevant.

Second, assuming national viewpoint diversity is of concern, the rapid advance of competing technologies, the growth in the number of stations, and the decline in viewership of over-the-air stations all have served to reduce both actual and potential levels of concentration of ownership of television stations to the point where the possibility of any undue concentration of economic power or ideological influence by a single broadcast owner or group of owners is virtually non-existent.

Third, at this point in time, the national ownership rules only serve to deprive the public of the many benefits of group ownership which result from economies of scale and increased stability in station operations, one of which could be the ability to add to the mix of program diversity.

Fourth, there is no economic or policy justification for continuing to hobble broadcasters alone with outmoded ownership limits when none of its competitors are similarly constrained.

**A. Concerns Over Maintaining Viewpoint Diversity
and Market Dominance Should be Focused Locally**

Central to the question of whether repeal of the national ownership rules would be likely to allow one or more entities to exercise harmful dominance of the marketplace depends, in part, upon how the marketplace is defined. Broadcast stations are licensed to serve distinct geographic markets. The boundaries of these

markets are established by the allocation of stations to various communities pursuant to the national policy of furthering the widest possible dissemination of free local television service (embodied in the Communications Act at 47 U.S.C. §§ 151, 303 and 307(b) and in the Commission's Rules at 47 C.F.R. §§ 73.21, 73.202 and 73.606), and by FCC rules limiting the power stations use to transmit broadcast signals, 47 C.F.R. §§ 211 et seq. In order to be economically viable, and to meet FCC requirements, broadcasters must, to a great extent, program to serve local audiences.

Having made the investment in programming and facilities to attract this audience, broadcasters then seek a return of that investment via advertising. Each station must provide service which is valued by the local audience in order to gain a return on its investment.

The Commission itself has acknowledged that the relevant market for assessing both diversity and economic concentration, essentially, is the local market. In deciding to expand the national station ownership limits from seven stations to twelve stations, the Commission found, with respect to viewpoint diversity, that:

The area from which consumers can select the relevant mass media alternatives is generally the local community in which they work and live. Radio and TV signals are available over the air in generally discrete local markets Indeed, it would appear eminently reasonable to consider viewpoint diversity to be primarily a matter pertaining to local diversity, in that viewers in San Francisco, St. Louis and Philadelphia each judge viewpoint diversity by the extent of sources of ideas available to them, not by whether those same or other ideas are available in other broadcast markets. Moreover, it is apparent that restrictions on the ownership of radio and TV stations at a nationwide level bear no necessary relationship to the number of

independent viewpoints in a particular local market, nor does relaxation or abolition of this rule affect the Commission's local ownership restrictions. Consequently, the lack of relevance of the rule to local viewpoint diversity persuades us that elimination of the national ownership rule is unlikely to have an adverse impact on the number of independent viewpoints available to consumers.^{28/}

Turning to the issue of economic concentration, again it would appear that the Commission's primary focus has been, and should be, on the local advertising market, with respect to which national ownership caps are irrelevant. Of the three types of advertising sold by broadcast stations -- local, spot and network -- the national ownership caps could conceivably have relevance only to the latter. Yet, as the Commission's Office of Plans and Policy itself has correctly observed, the economic market, whether for viewers in an advertiser-supported system or for distribution of programming by outlets in a subscriber-supported system, is essentially local in nature.^{29/} From the advertiser's perspective, the broadcaster's audience is the "product," because advertisers purchase access to audiences. The OPP states: "When the advertising message is relevant only to a locality, the advertiser's range of choice is limited to local outlets. Even advertising directed at the national audience is distributed through a series of local outlets."^{30/}

^{28/} Multiple Ownership R & O in Dkt. No. 83-1009, 56 R.R.2d at 856-866 (1984).

^{29/} D. Levy and F. Setzer, Measurement of Concentration in Home Video Markets (FCC Office of Plans and Policy) (December 23, 1983), n. 104.

^{30/} Id. at 7. OPP's analysis on the locally oriented nature of the advertising market appears to have been shared by NTIA in its comments in the Commission's 1984 proceedings considering elimination of the national ownership limitations. Multiple Ownership R & O, 56 R.R.2d at 878.

OPP's focus on local markets as the key concern with respect to economic concentration was ultimately adopted by the Commission itself in expanding the national ownership cap from 7 to 12 stations:

[T]he fact that local competitors may share common ownership with stations in other markets is unimportant in terms of competitive harm. The important consideration is instead the Commission's local rules, which restrict common ownership in local markets In sum, we believe that the prohibition against common ownership of two competing stations in the same market and service makes the Rule of Sevens unnecessary as a guarantee against competitive harm.^{31/}

The interests asserted by the Commission to justify imposing ownership limits -- the promotion of competition and diversity -- are clearly relevant only on a local level. Since the rational support for ownership limits applies only to considerations within a local market, there is no longer any justification for national ownership limits.

**B. The Explosion in the Number and Types of Video News and Information Sources and Advertising Outlets Available at the National Level and the Increased Fragmentation of the Video Marketplace
Render National Ownership Limits Unnecessary**

In support of its 1984 decision to expand to twelve the number of stations that could be owned by a single entity, the Commission noted the "explosion

^{31/} Multiple Ownership R & Q, 56 R.R.2d at 876. The Department of Justice's comments in the foregoing proceeding similarly concluded that "elimination of the Seven Station Rules will raise little risk of adverse competitive effects in any market" and that "license transfers involve no significant competitive risk merely because they result in common ownership of more than seven stations in a broadcast service." *Id.* at 874.

in the number of stations on the air and the competition that traditional broadcast outlets now face from new broadcast technologies and from nonbroadcast services such as cable" and concluded that "this growth in the number of programming sources is a significant factor that supports abolition of the [national ownership] rule."^{32/}

The "explosion" in the national alternatives available both to viewers in terms of diversity of viewpoints, and to advertisers seeking national exposure in the video marketplace has continued unabated and provides adequate support for elimination of the national ownership limitations even against those who would take issue with the assertion that concerns over maintaining viewpoint diversity and market dominance should be focused locally. Moreover, the extraordinary fragmentation in viewership and advertising that has occurred, and which is predicted to continue, in the video marketplace makes the possibility of undue concentration by one, or a small group of, broadcasters virtually nonexistent.

When the Commission, in 1984, was last reviewing the national ownership limitations there were 1,169 full power stations.^{33/} Today there are 1,488 full power stations and 968 LPTV stations.^{34/} Since 1984, cable has grown from 6,400 systems serving 32-35 million subscribers passing 64% of all television

^{32/} Id. at 866, 867.

^{33/} Id. at 866.

^{34/} Broadcasting, November 11, 1991, at 84. There are an additional 200 CPs pending for full power stations and 943 CPs pending for low power stations. Id.

households^{35/} to 11,135 systems serving 56.3 million subscribers (63.8% penetration)^{36/} and passing more than 93% of all television homes.^{37/} Moreover, the number of national cable programming services has more than doubled since 1984 from 67 to 181.^{38/}

While the number of wireless cable systems and subscribers appears to have declined from 99 systems serving 565,000 subscribers in 1982 to 50 systems serving 300,000 subscribers in 1990,^{39/} there are 126 outstanding wireless cable construction permits, 892 identified lottery selectees and 1,293 pending uncontested applications on file for such systems.^{40/}

Home satellite dish use has grown from approximately 900,000 units in 1984 to roughly 2.8 million units today and twenty percent of homes not passed by cable have home satellite dishes.^{41/}

^{35/} Multiple Ownership R & Q, 56 R.R.2d at 866.

^{36/} TV Digest, October 14, 1991 at p. 5.

^{37/} The Kagan Media Index, Oct. 22, 1990 at 2.

^{38/} Report in MM Dkt. No. 89-600, 5 FCC Rcd. 4962 (1990) ¶ 3; OPP Report at 76-77.

^{39/} Multiple Ownership R & Q, 56 R.R.2d at 866-867; Report in MM Dkt. No. 89-600, 5 FCC Rcd. 4962 (1990) ¶ 100.

^{40/} Report in MM Dkt. No. 89-600 (1990) note 144.

^{41/} Report in MM Dkt. 89-600 (1990) ¶ 103; OPP Report at 93.

VCR penetration has jumped from 20 percent to 78.2 percent of television households since 1984.^{42/} In 1984 there were three national broadcast networks, now there are four.

This increase in the availability and number of news, information and advertising video marketplace alternatives has, of course, resulted in considerable fractionalization of that marketplace. Prime time viewing of the three major networks declined from a 68 share to a 58 share between 1985 and 1990, while at the same time prime time viewing for independents, Fox affiliates and cable basic networks increased from a 16 to a 19 share, a zero share to a 4 share and a 7 share to a 14 share, respectively.^{43/} In its recent report, OPP summarized the fractionalization in viewing as follows:

[B]roadcast station audiences are declining. Viewing hours per household appear to be declining. Cable households view less over-the-air television than non-cable households, and the share of cable-originated services in their viewing is increasing Primetime network audiences have been falling since 1980 While viewing of independent stations as a group has increased, average per-station viewing has fallen because of the increased number of independent stations.^{44/}

To further assist the Commission in assessing the level of concentration in the television industry, NAB: 1) performed a Herfindahl-Hirschman Index (HHI) analysis for the industry using audience delivery of

^{42/} OPP Report at 106; TV Digest, October 14, 1991 at 5.

^{43/} OPP Report at 28.

^{44/} Id. at 45-46.

households as the measure of market control; and 2) compiled a list of the owners of the top rated stations in the top 25 markets. The products of this research, attached hereto as Appendix A, show an HHI of 187 (markets with an HHI below 1,000 are considered by the Department of Justice to be unconcentrated) and that the top 27 rated stations in the top 25 markets (two markets have ties) are owned by 17 different group owners. By either of these measures, the television industry is clearly highly unconcentrated.

Fractionalization and deconcentration in the national advertising marketplace has, of course, paralleled what has been transpiring in audience viewing. In 1984, the Department of Justice took the position that the national advertising market was "dominated by the three national networks."^{45/} Today, broadcast network advertising comprises less than half of the total spent on national video advertising.^{46/} From 1981 to 1991 national cable advertising sales climbed from \$150 million to \$2.1 billion.^{47/} At the same time, "the share of the networks in the [video advertising] market has been falling for a decade, . . . [and] [s]ince the mid-1980's real advertising revenues of the networks, and per-station real advertising revenues of broadcasters have been falling."^{48/} As for the future, OPP predicts

^{45/} Multiple Ownership R & O, 56 R.R.2d at 876.

^{46/} OPP Report at 116.

^{47/} CableVision, May 20, 1991.

^{48/} OPP Report at 134.

that "the decline [in network revenues] can be expected to worsen" while "cable advertising has great potential for growth."^{49/}

Both present data and projected trends clearly indicate that the elimination of national ownership limitations for television simply poses no threat, either to the diversity of independent viewpoints in the video information and entertainment market, or for undue economic concentration in the video advertising market regardless of whether the relevant markets are deemed local or national.

C. Current National Ownership Limitations Hinder Television's Ability to Compete in an Increasingly Competitive Marketplace and to Enhance Program Diversity

While minimal concentration often serves to promote competition, it has always been recognized that absolute diversity of ownership runs contrary to the goals of maximizing program diversity. In 1954, the Commission stated:

Clearly if the only relevant consideration were implementation of the policy of diversification, an absolute limitation of one broadcast station would best serve the public interest. But, of course, that is not the case On our nationwide system of broadcasting as we know it today requires that some multiple ownership of broadcast stations be permitted.^{50/}

The economic base supporting the television industry has been fragmented by increased competition both from within and from other forms of communication, primarily cable. The recently published OPP Report reveals that in

^{49/} Id.

^{50/} Report and Order in Docket No. 10822, 43 F.C.C. 2801, 2802 (1954) (emphasis added).

1989: 1) At least 25 percent of stations in the top ten markets experienced losses; 2) at least 50 percent of independent stations in all market classes below the top ten experienced losses; and 3) aggregate losses occurred in most size classes of markets below the top 100.^{51/} Moreover, for both affiliates and independents, average profits showed a pronounced downward trend over the last half of the 1980's.^{52/}

The marginal benefit to diversity of an additional owner no longer offsets the negative impact the new, rival owner has on the financial viability of other stations. As the Commission recently observed in its companion Notice of Proposed Rulemaking for radio: "Maximizing competition may provide many voices, but each might maintain such a minute fraction of the audience that it would lack an economic base sufficient to effectively serve the needs of the public."^{53/} By taking advantage of economies of scale, expanded group ownership can help to restore the industry's eroding financial stability, and thus promote the availability of new and diverse programming.

The potential advantages of economies of scale in the television industry that can be obtained from group ownership are numerous and have been thoroughly documented and recognized by the Commission itself.^{54/} Group

^{51/} OPP Report at 35-36.

^{52/} Id. at 37.

^{53/} Notice of Proposed Rule Making in MM Dkt. No. 91-140, 6 FCC Rcd. 3275 (1991) ¶ 5. (Hereinafter "Radio Notice.")

^{54/} Multiple Ownership R & O 56 R.R.2d at 868-873; 878-879; see Second Report and Order in MM Dkt. No. 87-7, 4 FCC Rcd. 1741, 1746-1750 (1989).

ownership enables stations to consolidate administrative and managerial functions. Stations are also able to coordinate advertising sales efforts and engage in joint program development and distribution. Perhaps most significantly, the financial benefits from greater access to capital in groups permit troubled stations to maintain operations. This is especially true when one station of a geographically dispersed group suffers from local economic conditions and the group's overall financial strength allows it to continue the same level of quality programming. Group ownership furnishes marginal stations with greater access to capital, enhanced business expertise and efficiencies of operation, helping to ensure their continued public service. The Commission has acknowledged,

These economies of scale provide broadcasters with greater financial resources which can be used to meet the needs and tastes of the public more effectively. Such benefits ultimately redound to the public by increasing the responsiveness, quality and diversity of programming.^{55/}

Current limitations on group ownership prevent the full realization of these benefits.

D. There Is No Current Economic or Policy Justification For Retaining National Ownership Limits Only on Broadcasters

The OPP Report observed that, in the next ten years, "broadcasters will face intensified competition as alternative media, financed not only by advertising but also by subscription revenues, and offering multiple channels of programming, expand their reach and audience."^{56/} At the same time these

^{55/} Radio Notice supra at ¶ 4.

^{56/} OPP Report at vii.

multichannel, multi-revenue source competitors are predicted to "expand their reach and audience," broadcast television is predicted to "suffer an irreversible long-term decline in audience and revenue share, which will continue throughout the current decade."^{57/}

None of these multichannel, multi-revenue source broadcast competitors, which include cable, MMDS, SMATV and DBS, are constrained by national ownership limits. As Chairman Sikes recently observed, "In the case of television, FCC rules sanction direct broadcast satellite operations But there are still strict percentage-of-household limits on the number of TV stations we permit a single entity to own. It is not easy to rationalize rules which say you can reach 100 percent of Americans by satellite, but no more than 25 percent if you use terrestrial transmitters."^{58/} Under these circumstances, to continue to hobble broadcasters alone with outmoded national ownership restrictions is an inequitable anachronism and an unjustified intrusion upon licensee discretion and marketplace operation.

In 1984, citing the absence of concentration in the television industry, the Commission raised television ownership limitations to permit a broadcasting group to own 12 television stations.^{59/} The caps were originally considered to be

^{57/} Id.

^{58/} Remarks of Alfred C. Sikes, Chairman, Federal Communications Commission, Before the International Radio and Television Society, September 18, 1990, New York, New York.

^{59/} See Multiple Ownership R & Q in Docket No. 83-1009, 56 R.R.2d at 859.

transitory, carrying a six year sunset provision. Seven years later, with the sunset provision rescinded, these ownership limitations persist and continue to hamper broadcast television, given the competitive challenges the industry faces today. By eliminating this unnecessary regulation on national ownership, the Commission will enable the television industry to maximize its service to the public.

IV. THE COMMISSION SHOULD CONSIDER POSSIBLE FURTHER MODIFICATIONS TO ITS RADIO/TELEVISION CROSS OWNERSHIP AND TELEVISION DUOPOLY RULES

As previously noted, NAB recognizes and concurs with the view that the Commission's goals of maintaining viewpoint diversity and preserving competition should be focused primarily at the local level and, accordingly, that certain limits on multiple station ownership in local markets continues to be appropriate. At the same time, one cannot help but to be struck by the strange regulatory anomalies aptly pointed out in a recent speech by the Commission's chairman whereby:

- 1) "FCC rules currently would not allow two high-channel UHF TV stations to be commonly owned if they have any significant overlap in their Grade B contours . . . even if there was a very high cable penetration in the signal overlap area . . . [while] [a]t the same time, we would allow that same party to control all the dozens of cable channels in the market -- and expect single channel broadcasters to compete with him effectively;"^{60/}

^{60/} Remarks of Alfred C. Sikes, Chairman, Federal Communications Commission. Before the International Radio and Television Society, September 18, 1990, New York, NY, p. 3.

2) "[I]n markets below the top 25, our rules would require a TV station seeking to merge with a radio station in its market to meet a very stringent waiver standard. So a high-channel UHF station in Omaha, for instance, might not be allowed to merge with a neighboring AM outlet.

There are virtually no rules, however, applicable to cable TV systems which offer so-called "cable radio." They can transmit as many radio services as they wish, whenever they want, with no Federal limitations. And, the same might be true of the digital audio broadcast satellite services which have been proposed.^{61/}

The first anomaly articulated by Chairman Sikes suggests the appropriateness of considering revisions to the television duopoly rules, while his second indicates that further adjustments to the radio/television cross ownership rules are warranted.

With respect to the television duopoly rule, NAB concurs with the analysis in OPP's recent report that the Commission may wish to consider relaxation of the rule to allow common ownership to television stations whose Grade A contours do not overlap^{62/} and elimination or relaxation of the rule to allow common ownership in the same market of unaffiliated UHF stations.^{63/} If the Commission has concerns about the outright revision of the television duopoly rules

^{61/} Id.

^{62/} In 1989, the Commission found that such a relaxation in the permissible contour overlaps for radio would serve the public interest. First Report and Order in MM Dkt. No. 87-7 4 FCC Rcd. 1723 (1989). In the same proceeding, the Commission also found a television station's Grade A contour to be the appropriate restriction for purposes of its one-to-a-market rule. See Second Report and Order in MM Dkt. No. 87-7, 4 FCC Rcd. 1741 (1989) ("Second Report & Order").

^{63/} OPP Report at 170.

to accommodate such changes, it may, at least, wish to consider establishing more liberal waiver provisions to allow greater flexibility in common television ownership in markets where a large number of separately owned broadcast entities already exist, and to accommodate "failed stations"^{64/} such as was done in 1989 when the Commission liberalized its one-to-a-market restrictions.^{65/} As suggested by Chairman Sikes, an equally, and perhaps more appropriate, consideration in permitting such waivers might be the level of cable penetration in a given market.

Turning to the radio/television cross-ownership rules, while it is true that the Commission revisited the revised these rules in the relatively recent past,^{66/} in so doing it conceded that, "the communications industry is undergoing . . . rapid change,^{67/} and that it was using "an incremental approach . . . [i]n an abundance of caution . . . in order to have a period of time in which to assess the ramifications of relaxing the radio/TV cross-ownership prohibition."^{68/}

NAB submits that consideration of the next "increment" is now appropriate. Specifically, NAB urges, as it has in the past,^{69/} that the rules be

^{64/} A liberal failed station waiver provision would seem appropriate given OPP's predictions of the increased likelihood of such situations. OPP Report at 160.

^{65/} Second Report and Order, *supra* note 62; Memorandum Opinion and Order in MM Dkt. No. 87-7, 4 FCC Rcd. 6489 (1989).

^{66/} Id.

^{67/} Second Report and Order at 1754.

^{68/} Id. at 1750, 1754.

^{69/} Comments of the National Association of Broadcasters in MM Dkt. No. 87-7, June 15, 1987.

amended to allow ownership of AM/TV combinations in the same market without requiring any special showing and that consideration should be given to: 1) allowing AM/FM/UHF combinations; 2) increasing beyond the top 25 markets those markets to which the rule's liberal waiver provisions apply; 3) reducing below 30 the number of "independent voices" required by the liberal waiver provisions; and 4) relaxing the showing required under the "failed station" exception to include "failing" stations.

There are any number of factual bases for taking such action. First, as was recently described in NAB's Comments in the Commission's pending proceeding considering revision of its radio rules and policies,^{70/} the radio industry, and particularly AM radio is ailing. Over one half of full-time AM stations lost more than \$11,000 in 1990; more than half of AM daytime stations lost over \$8,461; more than half of the FM stand-alone stations lost more than \$15,715; and over half of the AM/FM combinations lost \$10,464 or more. Moreover, 197 AM stations and 30 FM stations are currently dark.^{71/}

Second, as has been earlier demonstrated, television station revenues and audiences have, and are expected to continue to decline, while those of cable are expected to increase. As the Commission itself has said, this trend, "implies that in the future, mergers between the top radio and TV stations in individual markets should have an even smaller impact on the share of all TV viewing audience

^{70/} Comments of the National Association of Broadcasters in MM Dkt. No. 91-140, August 5, 1991, at 14.

^{71/} NPRM in MM Dkt. No. 91-140 (1991) ¶ 2.

controlled by individual group owners and thus on the overall level of competition in the TV advertising market."^{72/}

Third, regarding the anomaly in the regulation of broadcast versus cable at the local level, the Commission has correctly observed:

With respect to broadcast competition in general, it is also important to remember that no rules similar to the broadcasting "one-to-a-market" rules apply to cable TV systems. In particular, there are no Commission restrictions on the right of cable systems to own one or more AM or FM radio stations that serve the same communities as the cable system. Given the Commission's desire to continue to encourage the provision of over-the-air advertiser-supported and noncommercial television for which consumers pay no direct charge, we believe it would be anomalous to absolutely forbid common ownership of radio stations in the same market by television stations providing "free" service to consumers but to allow cable systems which charge for cable subscription to own local radio stations. Such an inequitable treatment would tend, through government regulation rather than competitive business activity, to improve the competitive position of cable systems, relative to broadcasting systems.^{73/}

In sum, relaxation of the television duopoly and radio/television cross ownership rules is warranted to enable broadcast stations to shore up marginal operations in an increasingly competitive environment by maximizing efficiencies afforded by joint operations and, at least, to reduce regulatory anomalies which discriminate against broadcasters and favor their competitors.

^{72/} Second Report and Order, 4 FCC Rcd. at 1746.

^{73/} Id.

V. THE NETWORK/CABLE AND BROADCAST/CABLE CROSS OWNERSHIP RULES ARE CORNERSTONES OF THE FREE OVER-THE-AIR BROADCAST SYSTEM, ARE ESSENTIAL TO MAINTAINING A COMPETITIVE BALANCE IN THE VIDEO MARKETPLACE AND SHOULD BE RETAINED

In recent years, perhaps no telecommunications issues have occupied more of the time, attention and analysis of both the Commission and Congress than have those relating to cable and, more particularly, to the present and future relationship between broadcasting and cable. Out of this extraordinary attention and analysis one clear and unequivocal consensus has emerged, namely that cable, particularly at the local level, is an increasingly unbridled and relatively unfettered monopoly that is on the verge of completely dominating the gateway to video services to the home, and that, for the present time, television broadcasting serves as the only, albeit partial, viable prophylactic to such domination.

Given this state of affairs, it is important that the Commission not adopt measures that would either potentially further enhance cable's ability to solidify its monopoly status, or potentially weaken the ability of broadcasters to compete with cable. Elimination of either the network/cable or broadcast/cable cross-ownership rules would do both.^{74/}

^{74/} NAB is cognizant of the fact that it filed comments in 1982 supporting elimination of the cable network cross ownership rule. See Comments of the National Association of Broadcasters, in CT Dkt. No. 82-434. Those Comments were filed in a bygone era when: 1) the channel capacity, homes passed and penetration, (35%) of cable systems was quite low; 2) must carry rules were in effect and cable served primarily as an antenna function for broadcast stations; 3) local, regional and national cable advertising and regional and national cable programming services were in their infancy; 4) vertical integration and horizontal concentration in
(continued...)

In considering what effects elimination of either of these rules would have on the video marketplace, we begin with the following premises, the support for which have been well documented both by Congress and the Commission. First, and foremost, "[t]he cable television industry has become a dominant nationwide video medium . . . [and] has become highly concentrated . . . a cable system serving a local community with rare exceptions, enjoys a monopoly . . . [and] television broadcasters like other programmers can be at the mercy of a cable operator's market power."^{75/}

Second, because broadcasters and cable "compete for viewers, programming, and advertising revenues" both at the local and national level, cable

^{74/} (...continued)

the cable industry was not foreseen, and the promise of competition in the provision of multichannel video services was great; 5) the deregulatory effects of the Cable Act of 1984 in eliminating rate regulation and virtually assuring one cable franchise per community had not been felt; and 6) the television broadcast industry was healthy and growing. Moreover, NAB's 1982 Comments were based on the then, but no longer, existing premises that: "the level of concentration in the cable industry is low" "undue concentration or control of programming by any one entity [is] unlikely" and that the "high level of competition . . . apparent at every stage of the development and operation of cable television systems in today's video marketplace would continue after rescission of the rule." Id. at 4.

^{75/} S. Rep. No. 102-92, 102d Cong., 1st Sess., 8, 45, 69 (1991); see HR Rep. No. 101-682, 101st Cong., 2d Sess., 40 (1990) ("Competition is essential both for ensuring diversity in programming and for protecting consumers from potential abuses by cable operators possessing market power. However, for a number of reasons, such competition has not emerged on a widespread basis"); Report in MM Dkt. No. 89-600, 5 FCC Rcd. 4962 (1990) ¶ 69 ("cable systems do possess varying degrees of market power in local distribution Generally there is no close substitute for that steadily expanding complement of specialized program services offered by the typical cable system at this time").

has the incentive to, and has engaged in anticompetitive practices involving carriage and channel positioning.^{76/}

Third, while "there is no close substitute for that steadily-expanding complement of specialized program services offered by the typical cable system at this time,"^{77/} at least the "availability of off-air broadcast television service is a good substitute for retransmitted broadcast signals and also offers some degree of competition to both broadcast-like as well as specialized basic cable programming services."^{78/}

Fourth, to the extent the Commission must rely, and of necessity, is relying on local broadcasters to provide competition for the cable monolith,^{79/} its stated objective is "to create a local television market that allows broadcasters to compete fully and fairly with other marketplace participants. Promoting fair competition between free over-the-air broadcasting and cable helps ensure that local communities will be presented with the most attractive and diverse programming possible."^{80/}

^{76/} Report in MM Dkt. No. 89-600, 5 FCC Rcd. 4962 (1990) ¶¶ 146, 144, 165, 166; S. Rep. No. 102-92, 102d Cong., 1st Sess. 35, 42-46 (1991).

^{77/} Report in MM Dkt. No. 89-600, 5 FCC Rcd. 4962 (1990) ¶ 69.

^{78/} Report and Order and Second Further Notice of Proposed Rule Making in MM Dkt. No. 90-4, 6 FCC Rcd. 4545 (1991) ¶ 6.

^{79/} Id.

^{80/} Program Exclusivity in the Cable and Broadcast Industries, 64 R.R.2d 1818, 1840 (1988).

Fifth, "the network-affiliate relationship is a true partnership serving the interest of both partners and the public interest by combining efficiencies."^{81/}

Considerable credit for [the] existence of [locally]originated programming] must go to the framework in which it is broadcast -- a framework formed by the national programming networks and the skillfully-crafted combinations of programming they buy from independent producers. The networks, their affiliates, and independent stations marshal massive resources to mix and blend this programming to appeal to the viewing audience. Clearly a local station's strength lies not only in its individual programs, but also in this synergy of local and national offerings.^{82/}

To summarize these assorted premises, we find the current state of the home video market place at the local level to be increasingly dominated by the local cable system who already has the motive and means to debilitate its chief, albeit partial, competitors -- local broadcasters largely supported by programming from networks devoted to the free over-the-air system of broadcasting -- on whom the Commission is relying to continue to provide: 1) viewpoint diversity; 2) an alternative video distribution mechanism; and 3) an alternative means to disseminate advertising.

In most markets, cable's strongest competitors are the local network affiliates. Their continued strength and viability, in turn, depends, in large part, on the continued strength and viability of the networks with whom they are affiliated and in the loyalty of those networks to the system of over-the-air broadcasting in

^{81/} Report in Gen. Dkt. No. 86-336, 2 FCC Rcd. 1669, 62 R.R.2d 687, 732 (1987).

^{82/} Report in MM Dkt. No. 89-600, 5 FCC Rcd. 4962 at ¶ 145. (Emphasis supplied.)

general, and to the network/affiliate system in particular. In this regard, it was long ago observed that: "No man can serve two masters: for either he will hate the one, and love the other; or else he will hold to the one and despise the other."^{83/}

Finally, the broadcasting system, on which such heavy reliance is being placed to serve as a foil to cable's domination of the video marketplace, is less than healthy. The local television broadcasting industry "increasingly is threatened and disadvantaged . . . undoubtedly due to a number of forces, but the emergence of strong national cable television companies, with rights to serve as exclusive providers of dozens of channels, is surely a significant factor, as is the power of cable television to attract both subscriber and advertising revenue."^{84/} As a result, it is predicted that "by the end of the decade, fewer broadcast stations will serve a shrunken, but nevertheless substantial, audience."^{85/} As for the networks, it is predicted that their "audiences will continue to decline . . . [and] [a]s cable advertising becomes a better substitute for network advertising, network revenue will fall along with audiences."^{86/}

Given these circumstances, at least the general course that regulators should, and should not, pursue would seem painfully obvious. On the cable side of the equation, while a debate may rage as to whether cable should be re-regulated, or

^{83/} Matthew 6:24.

^{84/} Report in MM Dkt. No. 89-600, 5 FCC Rcd. 4962 (1990) ¶ 155.

^{85/} OPP Report at ix.

^{86/} Id.

whether competition by other multichannel video service providers should be stimulated, certainly nothing need or should be done to permit cable further to solidify its market power. On the broadcast side, additional measures need to be adopted to strengthen broadcasters' competitive posture vis a vis cable, and nothing should be done that would further fractionalize or weaken the television broadcast system. In NAB's view, devastating adverse consequences could befall the broadcast/cable competitive relationship were: 1) TCI or Time Warner, for example, allowed either to acquire one of the broadcast networks or a chain of broadcast stations in markets where they already owned the local cable system; or 2) a broadcast network allowed to acquire cable systems.

A. Potential Adverse Consequences That Could Result Were A Major MSO To Acquire a Network or Were a Network to Acquire an MSO

1. Local cable systems already have extraordinary incentives to, and do, manipulate carriage and channel positions to maximize exposure and profits from cable programming services in which their corporate parents have a financial interest. There is every reason to believe the same scenarios would be played out favoring the affiliate whose network was owned by an MSO or whose network owned the local cable system, thereby wreaking further havoc in the local video marketplace.

2. Extraordinary conflicts and divided loyalties would be created by situations where an MSO-owned network's affiliate would be competing against the MSO's local cable system for viewers, advertising and the rights to local sporting

events or in situations where network owned cable systems were competing against the network's own affiliates in these areas.

3. A blockbuster series, movie or sport package becomes available. Does an MSO that owns cable systems, a network and cable programming services, or a network that owns cable systems and cable program services bid for it on behalf of its network or one of its cable programming services? Would not the incentive and opportunity for greater profits from pay tiers and pay per view prompt future cable/network conglomerates increasingly to siphon such premier programming away from the free over-the-air broadcast system? Such cable/network conglomerates could adopt a strategy to have their network only acquire second rate programming and watch its affiliates who are competitors with many of their local cable systems shrivel and slowly die on the vine.

4. The dual role of network owner and local cable operator clearly would adversely affect affiliates' negotiations for network compensation and non-duplication and syndex protection (not to mention retransmission consent were it adopted), especially in areas of heavy cable penetration where there exists the potential simply to bypass affiliates and provide cable systems with direct network feeds or the signal of another distant affiliate.

5. Would not an entity that owned both a substantial number of cable program services and local cable systems and a national broadcast network be in an extraordinary bargaining position with respect to independent program suppliers and competing networks?